

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

PHILIP P. CAPONE, III,

Petitioner,

v.

DOUGLAS PERCY,

Respondent.¹

ORDER

17-cv-781-jdp

Pro se petitioner Philip P. Capone, III, a Wisconsin prisoner incarcerated at the Oakhill Correctional Institution, sought a writ of habeas corpus under 28 U.S.C. § 2254. Capone's extended supervision was revoked in an administrative proceeding, and he contended that the revocation proceeding should have been in court before a judge. I denied his petition at screening, explaining that the law did not require his revocation proceeding to take place before a judge. Dkt. 7. I also denied his request to be released on bail, *id.*, and his motion to alter or amend judgment, Dkt. 14.

Capone now moves to reopen the time to file a notice of appeal, Dkt. 16, which I construe as a motion for an extension of time to file a notice of appeal under Federal Rule of Appellate Procedure 4(a)(5). Capone contends that he delivered his notice of appeal to prison staff for mailing on February 4, 2018, but this court's staff did not receive it on time. *Id.* ¶¶ 9–17. This court's staff docketed Capone's notice of appeal on March 26, 2018, Dkt. 17, and the United States Court of Appeals for the Seventh Circuit noted that Capone's notice was filed

¹ Capone is now incarcerated at the Oakhill Correctional Institution, so I have amended the caption to show Douglas Percy, the warden of Capone's new facility, as the respondent.

28 days late because the time for filing a notice of appeal began on January 25, 2018, when I denied his motion to alter or amend judgment. No. 18-1662, Dkt. 2 (7th Cir. Mar. 27, 2018). The court of appeals also noted that it lacked power to extend the time for filing the notice of appeal absent this court's decision to grant an extension under Federal Rule of Appellate Procedure 4(a)(5). *Id.*

When a district court denies a certificate of appealability, a petitioner may request a certificate of appealability from a court of appeals, and filing a notice of appeal constitutes such a request. Rule 11(a) of the Rules Governing Section 2254 Cases; Fed. R. App. P. 22(b)(2). Under Rule 11(b) of Section 2254 Cases, Federal Rule of Appellate Procedure 4(a) governs the time to file a notice of appeal. Under Rule 4(a)(5)(A)(ii), a district court may extend the time to file a notice of appeal if a party shows good cause for the extension. A party may show good cause when he had “no fault” in filing an untimely notice of appeal. *Sherman v. Quinn*, 668 F.3d 421, 425 (7th Cir. 2012). For example, “if the Postal Service fails to deliver a notice of appeal, a movant might have good cause.” *Id.* (internal citation and quotation marks omitted).

Here, Capone has shown good cause to extend the deadline for filing a notice of appeal. He states in his motion—under penalty of perjury—that he delivered a notice of appeal to prison staff for mailing on February 4, 2018. Dkt. 16, ¶¶ 9–17. I have some doubt whether this statement is true. Capone's notice of appeal says, “Dated this 4th day of February 2018 and delivered to prison officials for mailing to the Clerk of Court.” Dkt. 17. This does not match how he indicated the date of service in his prior submissions. *Compare* Dkt. 17, *with* Dkt. 12, at 19, *and* Dkt. 13, at 22. But whether Capone actually handed his notice of appeal on time is difficult to verify at this point, so I will give Capone the benefit of the doubt and credit his

statement. The fact that this court's staff did not receive his notice of appeal on time is not his fault under his version of facts, so I will grant Capone's motion for an extension.

The court of appeals also ordered Capone to either pay the \$505 filing fee or file a motion to proceed *in forma pauperis* on appeal by April 9, 2018. No. 18-1662, Dkt. 1-2 (7th Cir. Mar. 26, 2018). Capone must comply with the order and submit to this court either the payment or the motion by April 9, 2018.

ORDER

IT IS ORDERED that:

1. Petitioner Philip P. Capone, III's motion for an extension of time to file a notice of appeal, Dkt. 16, is GRANTED.
2. Petitioner must pay the \$505 filing fee or file a motion to proceed *in forma pauperis* on appeal by April 9, 2018.

Entered April 5, 2018.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge